

MINUTES OF THE OPEN SESSION OF THE RHODE ISLAND ETHICS COMMISSION

August 19, 2008

The Rhode Island Ethics Commission held its 15th meeting of 2008 at 9:00 a.m. at the Rhode Island Ethics Commission conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Tuesday, August 19, 2008, pursuant to the notice published at the Commission Headquarters and at the State House Library.

The following Commissioners were present:

**Barbara R. Binder, Chair Frederick K. Butler
Ross Cheit, Vice Chair Deborah M. Cerullo SSND
J. William W. Harsch, Secretary Edward A. Magro
Richard E. Kirby***

Also present were William J. Conley, Jr., Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Staff Attorneys Jason Gramitt, Dianne L. Leyden and Esme DeVault; and Deputy Chief Investigator Peter J. Mancini.

At 9:04a.m., the Chair opened the meeting. The first order of business was a motion to approve minutes of the Open Session held

on July 29, 2008. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Butler, it was unanimously

VOTED: To approve minutes of the Open Session held on July 29, 2008.

ABSTENTION: Edward A. Magro.

The next order of business was that of advisory opinions. The advisory opinions were based on draft advisory opinions prepared by the Commission Staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date. The first advisory opinion was that of L. Anthony Cirillo, M.D., a former Chief of the Center for Emergency Preparedness and Response for the Rhode Island Department of Health. Staff Attorney DeVault presented the Commission Staff recommendation. The petitioner was present. In response to Commissioner Harsch, the petitioner stated that his consulting company does not have any other clients at this time, as he is just starting out. He indicated that Rhode Island Hospital suggested that it would be appropriate for him to get an opinion. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Butler, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to L. Anthony Cirillo, M.D., a former Chief of the Center for Emergency

Preparedness and Response for the Rhode Island Department of Health

***Commissioner Kirby arrived at approximately 9:15 a.m.**

The next advisory opinion was that of Representative Steven J. Coaty, a member of the Rhode Island House of Representatives. Senior Staff Attorney D'Arezzo presented the Commission Staff recommendation. The petitioner was present. Upon motion made by Commissioner Butler and duly seconded by Commissioner Magro, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Representative Steven J. Coaty, a member of the Rhode Island House of Representatives.

The next advisory opinion was that of Claire McQueeney, a member of the New Shoreham Historic District Commission. Staff Attorney Gramitt presented the Commission Staff recommendation. The petitioner was not present. Commissioner Butler inquired if anyone else ever supplies flowers for weddings at the Spring House. Staff Attorney Gramitt replied that the petitioner advises that there are other florists on the island. He stated that he could not make a representation as to whether other florists supply flowers for weddings at the Spring House. In response to Commissioner Kirby, Staff Attorney Gramitt stated that the petitioner claims that she has

no recurring contracts to provide flowers to the Spring House. Upon motion made by Commissioner Magro and duly seconded by Commissioner Butler, it was uananimously

VOTED: To issue an advisory opinion, attached hereto, to Claire McQueeny, a member of the New Shoreham Historic District Commission.

The next advisory opinion was that of John Hanley, Building Official for the City of Pawtucket. Staff Attorney DeVault presented the Commission Staff recommendation. The petitioner was not present. Upon motion made by Commissioner Butler and duly seconded, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to John Hanley, Building Official for the City of Pawtucket.

The next advisory opinion was that of Wallace F. Lees, a member of the Burrillville Town Council. Staff Attorney DeVault presented the Commission Staff recommendation. The petitioner was not present. In response to Commissioner Kirby, Staff Attorney DeVault indicated that the petitioner represented that there are several hundred properties in the affected area. Commissioner Cheit inquired whether the Commission had ever applied the class exception in a situation where the number of abutting property owners was so large. Staff Attorney DeVault replied that there have been no such prior opinions

issued and suggested that it might be difficult to undertake a class exception analysis in such circumstances because there would be a different impact upon each property owner. In further response, she stated that petitioners have previously rebutted the presumption of financial impact on their property by presenting expert testimony and analysis regarding the impact.

Commissioner Harsch asked whether there appears to be a property ownership exception to the class exception. Staff Attorney DeVault stated that she could not make a generalized statement to that effect, given that it would depend upon the particular matter under consideration and what the specific impact would be on each property. Commissioner Kirby referenced zoning law requirements for notice to an identified group of property owners within a 200 foot radius. Upon motion made by Commissioner Magro and duly seconded by Commissioner Butler, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Wallace F. Lees, a member of the Burrillville Town Council.

At approximately 9:34 a.m., upon motion made by Commissioner Kirby and duly seconded by Commissioner Magro, it was unanimously

VOTED: To go into Executive Session pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (4), to wit:

a.) Motion to approve minutes of Executive Session held on July 29, 2008.

**b.) In re: Donald L. Carcieri,
Complaint No. 2008-3**

c.) Status Update:

**William V. Irons v. Rhode Island Ethics Commission, Superior Court
C.A. No. 07-6666**

d.) Motion to return to Open Session.

The Commission reconvened in Open Session at 9:53 a.m. Chair Binder reported that the Commission received advice from Legal Counsel in Executive Session regarding a Motion to Recuse filed in the matter of In re: Donald L. Carcieri, Complaint No. 2008-3. Legal Counsel Conley advised that yesterday the Respondent filed a Motion for Recusal of Commissioner Cheit, which constitutes a pre-hearing motion to be acted upon in Executive Session. He cited to Regulation 1012's requirement that such motions be filed in writing no later than five days prior to hearing. He noted that such motions may be disposed of by the Commission with or without oral argument, at its discretion. He addressed the motion, although not timely filed, and stated that the question is whether Commissioner Cheit can sit fairly and objectively and apply the legal standards to the facts presented

based upon comments he allegedly made in considering the Respondent's request for an advisory opinion on June 17, 2008.

Legal Counsel Conley explained that, following the Respondent's logic, a Commissioner who votes in the negative regarding issuance of an advisory opinion must later recuse if a complaint is filed based upon the conduct. He stated that the Respondent asks you to accept the proposition that the Commission cannot distinguish between its advisory and adjudicatory capacities. He represented that all an advisory opinion says is that if you undertake this conduct you are acting at your own peril. He added that if all the members were to vote in the negative regarding issuance of an opinion, the entire membership would have to recuse itself in a subsequent adjudicatory process because they voted against the opinion. Legal Counsel Conley referred to the comments the Respondent alleges Commissioner Cheit to have made. He stated that the "bail out" comment is vernacular for the fact that the Code does not allow for retroactive opinions; an opinion can no longer be advisory if the individual already engaged in the conduct. He advised that a motion to recuse a fact finder is addressed to the sound discretion of that individual, not to the Commission as a whole.

Commissioner Cheit disclosed that he knows Thomas Dickinson, Respondent's counsel, from his work on the credit union crisis many years ago, but that he believes he is able to fairly and objectively participate. He stated that his position on June 17th was that the

Commission should not issue a retroactive advisory opinion to anyone at all. He stated his belief that the Commission unanimously declined to issue such an opinion. He expressed that he made no statement as to what the Commission “would have done,” but that he may have said what the Commission “might have done.” He represented that there is no basis for recusal.

At 10:03 a.m., upon motion made by Commissioner Magro and duly seconded by Commissioner Butler, it was unanimously

VOTED: To return to Executive Session.

At 10:36 a.m., the Commission reconvened in Open Session. The first order of business was a motion to seal minutes of the Executive Session held on August 19, 2008. Upon motion made by Commissioner Magro and duly seconded by Commissioner Butler, it was unanimously

VOTED: To seal minutes of the Executive Session held on August 19, 2008.

Chair Binder reported that the Commission took the following actions in Executive Session: 1) approved minutes of the Executive Session held on July 29, 2008; 2) considered Legal Counsel’s advice with respect to a motion to recuse and returned to Open Session for comment; 3) initially determined that Complaint No. 2008-3, In re:

Donald L. Carcieri, alleges sufficient facts to support a knowing and willful violation of the Code; and 4) received a status update on William V. Irons v. Rhode Island Ethics Commission, Superior Court C.A. No. 07-6666.

The next order of business was a discussion of proposed changes to the 2008 Financial Statement. Senior Staff Attorney D'Arezzo explained that the Staff is updating the financial statement for next year's use and, upon review, there is no stand alone requirement in the law that the names of dependent children be disclosed, absent them having certain requisite levels of financial activity. She noted that members of the Commission have raised the issue from time to time and individuals who are subject to the requirement have inquired about the necessity for disclosure, citing privacy and safety concerns.

Senior Staff Attorney D'Arezzo noted that, as outlined in her memorandum, disclosure would still be required for those dependent children who: 1) received \$1,000 or more gross income from any employer; 2) held a financial interest in any real estate; 3) received \$1,000 or more gross trust income; 4) held certain enumerated positions within a business entity; 5) were the recipient of total gifts or contributions in excess of \$100 in cash or property; 6) held a 10% or greater ownership interest, or a \$5,000 or greater owner or investment interest in any business; 7) acquired or divested any such ownership or investment interest in any business; and/or 8) were

indebted in excess of \$1,000 to any person, business entity or organization, with certain exceptions.

Commissioner Kirby stated that he had questioned the practicality of requiring disclosure of dependent children when filers really should be required to list their adult children and their employment. In response to Commissioner Cerullo, Senior Staff Attorney D'Arezzo confirmed that dependent children who had threshold levels of employment income, business and real estate interests and trust income would still be required to be listed in response to Questions # 6, 7, 8, 9, 10, 11, 14, 15 and 16. Commissioner Cheit expressed that he is inclined to agree with removing the requirement, noting that the Commission should do anything it can to make the process user-friendly. He inquired whether there might be some public interest in knowing this information, however, and using it as an investigatory tool.

Senior Staff Attorney D'Arezzo informed that some members of the public have used this type of information in the past, but she indicated that the Commission Staff has not had any matters in which the disclosure of a dependent child on the financial statement assisted the investigatory process. Chair Binder suggested that the interest would really be in whether such dependent children were receiving gifts and whether they had employment. Senior Staff Attorney D'Arezzo confirmed that their disclosure would still be required elsewhere on the form. Upon motion made by

Commissioner Magro and duly seconded by Commissioner Butler, it was unanimously

VOTED: To adopt the Staff recommendation to remove language from the financial disclosure form requiring the disclosure of dependent children.

Commissioner Kirby suggested that the Staff look into whether the disclosure of non-dependent adult children could be effectuated by statute or regulation.

The next order of business was a status report on the class exception and outside employment issues. Staff Attorney DeVault informed that, in response to a request at the last meeting, the Staff is obtaining information about the California statute. She noted that “lobbyist employer” is a defined term in the statute. She advised that she has been unable to locate any advisory opinions or cases relating to it, but she is in contact with the California Fair Political Practices Commission to obtain additional information. Further information will be provided to the Commission in September.

In response to Commissioner Harsch’s inquiry at the last meeting, Staff Attorney DeVault reported that there have been no prior historical or comparative analyses performed by Staff with respect to the issue of outside employment, aside from the Staff’s March 2008 memorandum regarding the federal system. She advised that an

initial search revealed that hundreds of advisory opinions have been issued on this prevalent topic. However, she noted that the opinions are all based upon very factually specific circumstances, with certain general guidelines. Namely, there are restrictions regarding the use of public time and resources, transactions with potential or actual clients, solicitation and the use of confidential information obtained from one's public position.

Commissioner Harsch commented that those factors could be used as guidelines in a policy document to prevent it from becoming so ad hoc. He indicated that these categories would be useful and perhaps could be handed out to people in written format for guidance. Commissioner Butler pointed out that the Commission generally includes a statement that it only opines as to whether such outside employment would violate the Code and cannot comment on any other laws or departmental policies. Commissioner Cheit inquired whether the Commission would be able to police the performance of outside employment during the public work day and referenced a recent case where such work was performed with a supervisor's knowledge. Senior Staff Attorney D'Arezzo clarified that in that case the individual had the supervisor's permission to adjust his schedule to compensate for the work. She added that records confirmed that personal and vacation hours were also discharged. Commissioner Kirby commented that it would be a problem if the person were not working their hours and did not take vacation, personal or flex-time.

Commissioner Cheit raised the situation of summer employment, as addressed in a recent advisory request, and also suggested that a general commission advisory could provide guidance. Staff Attorney Gramitt advised that the General Commission Advisories have not been updated in a while and he suggested bringing them before the Commission for consideration, individually, as time permits. He stated that the Commission could adopt one addressing outside employment, in addition to withdrawing those that no longer apply. Chair Binder voiced her support for the idea.

Commissioner Cerullo inquired whether the Commission might want to consider some type of disclosure requirement so people have to think about their outside employment on an annual basis. She expressed her concern regarding people who received opinions regarding their outside employment forgetting the specific parameters within which they may do so as time progresses. She indicated that it might be helpful to remind them of what the standard is. Commissioner Kirby stated that it would be a good idea, and he suggested including the list of criteria of which Commissioner Harsch spoke with the annual financial statements. In response to Commissioner Cheit, Staff Attorney Gramitt indicated that requests for advisory opinions would likely increase upon issuance of new General Commission Advisories. Commissioner Kirby suggested that the list of criteria also could be posted on the website.

The next order of business was the Director's Report. Executive Director Willever reported that there are four complaints, three advisory opinions and one preliminary investigation pending. He advised that one formal APRA request was granted since the last meeting. He stated that Staff Attorney Gramitt presented an ethics seminar for more than 550 attendees as part of the Attorney General's annual Open Government Summit. He informed that he and Staff Attorney Gramitt spoke with a group of government officials from Haiti yesterday, as part of an ongoing program with the U.S. State Department. Director Willever advised that the annual COGEL conference will be held in Chicago from December 7-10 and Staff Attorney Gramitt has been asked to be a speaker. He stated that any Commission member who wishes to attend should contact him, as funding is limited and he wishes to send additional staff. Director Willever reported that the Commission received a cut in its enacted budget and will be operating with approximately 1.3 million dollars for this year. He advised that Staff has taken steps to function within the existing budget constraints. He informed that he has begun the process to fill a vacancy created by the unanticipated departure of an administrative staff member.

The next order of business was New Business. Commissioner Kirby inquired regarding the status of electronic filing. Senior Staff Attorney D'Arezzo explained that online filing is one portion of Operation Cyber Expedition, in which the Staff is in the process of updating the computer database and website and exploring online

filing feasibility. In further response, she indicated that there would need to be a statutory change if online filing is implemented, given that the Commission is still required to mail the forms to filers each year. In response to Commissioner Harsch, Staff Attorney Gramitt noted that the General Commission Advisories are viewable on the website.

At approximately 11:20 a.m., upon motion made by Commissioner Kirby and duly seconded by Commissioner Butler, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch

Secretary